TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1921.

No. 239.

HENRY CLAIRMONT, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MONTANA.

FILED MARCH 28, 1922.

(22,079.)

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a *Names and Addresses of Attorneys of Record.*

Hon. Geo. W. Wickersham, Attorney General of the United States, Washington, D. C., and
James W. Freeman, Esq., United States Attorney, District of Montana, Helena, Montana, for Plaintiff and Defendant in Error.
O. W. McConnell, Esq., Helena, Montana, for Defendant and Plaintiff in Error.

1 In the District Court of the United States in and for the District of Montana.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Be it remembered, that on the 3rd day of February, A. D. 1910, a Judgment Roll was duly made and filed herein, which said Judgment Roll is in the words and figures following, to-wit:

2 UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States within and for the District of Montana, of the Term of November, in the Year of Our Lord One Thousand Nine Hundred and Eight.

The Grand jurors of the United States of America, duly empanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Henry Clairmont, late of the State and District of Montana, on the 15th day of August, A. D. 1908, at and within the State and District of Montana, did, then and there, wrongfully and unlawfully introduce a large quantity of spirituous and intoxicating liquors, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the Grand Jurors aforesaid unknown, into the Flathead Indian Reservation, in the State and District of Montana, the said Flathead Indian Reservation, then and there, being an Indian country under the charge of Samuel Bellew, then and there the United States Indian Agent and Superintendent in charge of said Flathead Indian Reservation; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

3 (Indorsed:) No. 1327. United States District Court, District of Montana. United States of America v. Henry Clairmont. Indictment, a true bill. C. A. Whipple, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney District of Montana. Witnesses: Fred C. Morgan, Sam Cone, Hugh Montgomery, Joe Matulys, Sam Bellew. Presented by the Grand Jury, in open court, by their Foreman, and in their presence, and filed this 22nd day of Dec. A. D. 1908. Geo. W. Sproule, Clerk, by C. R. Garlow, Deputy Clerk. Bail $500.00. W. H. Hunt, Judge.

4 UNITED STATES OF AMERICA,
District of Montana, ss:

To the Marshal of the United States of America for the District of Montana, and his Deputies, or any or either of them, Greeting:

Whereas, at a District Court of the United States of America, for the District of Montana, begun and held at the City of Helena, within and for the District aforesaid, on the 22nd day of December, in the year of our Lord one thousand nine hundred and eight, the Grand Jurors in and for the said District brought into the said court a true Bill of Indictment against Henry Clairmont, for unlawfully introducing whiskey into the Flathead Indian Reservation, as by the said indictment, now remaining on file and of record in said court, will more fully appear; to which indictment the said Henry Clairmont has not yet appeared or pleaded:

Now, therefore, you are hereby commanded in the name of the President of the United States of America, to apprehend the said Henry Clairmont and him bring before the said court, at the United States District Court room, in the Federal Building at Helena, Montana, to answer the indictment aforesaid.

Witness the Honorable William H. Hunt, Judge of the said court, and the seal thereof at Helena, in said District, on the 22nd day of December, A. D. 1908.

[SEAL.]

GEO. W. SPROULE, *Clerk*,
By C. R. GARLOW,
Deputy Clerk.

5 *Marshal's Office.*

UNITED STATES OF AMERICA,
District of Montana, ss:

In obedience to the Warrant, I have taken into custody the therein named Henry Clairmont at near Ronan, in Missoula County, in said District on the 18th day of January, 1909, and taken him before Wallace P. Smith, Esq., United States Commissioner at Missoula, Montana in and for said District, before whom he was admitted to bail in the sum of Five Hundred Dollars ($500.00), and thereupon he was released from custody. The bail bond is returned herewith and made a part of this return.

ARTHUR W. MERRIFIELD,
United States Marshal,
By J. G. SANDERS, *Deputy.*

Indorsed: No. 1327. United States District Court, District of Montana. The United States of America vs. Henry Clairmont. Bench Warrant. Bail fixed at $500.00. Jas. W. Freeman, U. S. Attorney. Filed Jan. 21st, 1909. Geo. W. Sproule, Clerk.

6 In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES
vs.
HENRY CLAIRMONT.

Defendant with his counsel, N. W. McConnell, present in court and being arraigned answered that his true name is Henry Clairmont; and thereupon defendant waived the reading of the Indictment and time to plead, and thereupon defendant pleaded that he is not guilty, with leave to defendant to hereafter withdraw his plea if desired; and plea of not guilty entered.

Entered, in open court, January 21, 1909.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of journal entry.

GEO. W. SPROULE, *Clerk,*
[SEAL.] By C. R. GARLOW,
Deputy Clerk.

7 In the District Court of the United States in and for the District of Montana.

No. 1327.

UNITED STATES OF AMERICA, Complainant,
vs.
HENRY CLAIRMONT, Defendant.

Verdict.

We, the jury in the above entitled action, find the above named defendant guilty in manner and form as charged in the indictment, and we respectfully recommend the defendant to the mercy of the court.

C. W. FLEMING, *Foreman.*

Indorsed: No. 1327. In the District Court of the United States, in and for the District of Montana. United States of America. Plaintiff, vs. Henry Clairmont, Defendant. Verdict. Filed and entered Mar. 26, 1909. Geo. W. Sproule, Clerk.

8 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Motion in Arrest of Judgment.

Now comes the defendant, Henry Clairmont, in his own proper person, the court being about to pronounce sentence and judgment upon the verdict of the jury, returned into court in this cause, and moves the court to arrest the judgment upon the indictment upon which this defendant was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to-wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

2. That the court erred in failing and refusing to instruct the jury to acquit the defendant.

3. That it appears from the evidence that the defendant was on a train of the Northern Pacific Railway Company at the time he was arrested, and at the time it is alleged that the liquor was found upon his person, and it was not shown that he had introduced, or attempted to introduce the same upon an Indian reservation at the time said liquor was taken from him.

4. At the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula on a train
9 of the Northern Pacific Railway Company; had not gotten off of said train, or attempted to get off of said train, but was still upon the same; had not been upon the Flathead Indian Reservation or introduced, or attempted to introduce, any liquor thereon, but was occupying his seat in the railway coach of said Northern Pacific train.

5. That at the time of the arrest of the defendant the said defendant was on a train of the Northern Pacific Railway Company, which said train was on the right-of-way of said railway company, which said right-of-way had been ceded by a treaty of the Flathead Indians to the United States of America, and by the United States of America, by act of Congress, had been dedicated and given to said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

6. That the United States of America had no power or authority over any offense committed on said train of the Northern Pacific Railway Company by the defendant, but the sole and exclusive jurisdiction of any offense committed upon said train was in the State of Montana.

HENRY CLAIRMONT.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing acknowledged and copy received this March 27th, 1909.

S. C. FORD,
Ass't U. S. Att'y.

Indorsed: No. 1327. In the District Court of the United States, for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Motion in Arrest of Judgment. Filed March 27, 1909. Geo. W. Sproule, Clerk.

10 In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES OF AMERICA
vs.
HENRY CLAIRMONT.

This cause, heretofore submitted upon a motion in arrest of judgment, came on regularly at this time for the judgment and decision of the court; and, after due consideration,

It is ordered that said motion be, and the same hereby is denied, to which ruling of the court the defendant excepted, and exception noted.

Entered, in open court, January 20, 1910.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of journal entry:
GEO. W. SPROULE, *Clerk,*
[SEAL.] By C. R. GARLOW,
Deputy Clerk.

11 In the District Court of the United States, District of Montana.

No. 1327.

THE UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Judgment.

The United States Attorney with the defendant and his counsel present in court.

The defendant was duly informed by the court of the nature of the charge against him, for the offense of wrongfully and unlawfully introducing spirituous and intoxicating liquors, to-wit, whiskey, into the Flathead Indian Reservation, an Indian country, committed on

the 15th day of August, A. D. 1908, at Flathead Indian Reservation, in the State and District of Montana, as charged in the indictment herein; and of his indictment, arraignment and plea of not guilty as charged; and of his trial and the verdict of the jury "Guilty" as charged.

And the defendant was then asked if he had any legal cause to show why judgment should not be pronounced against him, to which he replied that he had none, and no sufficient cause being shown or appearing to the court, thereupon the court rendered its judgment as follows, to-wit:

That whereas, the said defendant having been duly convicted in this court of the offense of wrongfully and unlawfully introducing spirituous and intoxicating liquors, to-wit, whiskey, into the Flathead Indian Reservation, an Indian country, committed on the 15th day of August, 1908, at Flathead Indian Reservation, in the State and District of Montana, as charged in the indictment herein;

It is therefore considered, ordered and adjudged that for said offense you, the said Henry Clairmont, be confined and imprisoned in the county jail of Lewis and Clark County, at Helena, Montana, for the term of sixty days, and that you pay a fine of One Hundred Dollars, and be confined in said county jail until said fine is paid or you are legally discharged according to law.

Judgment rendered and entered this 3rd day of February, A. D. 1910.

GEO. W. SPROULE, *Clerk.*

Attest a true copy of Judgment:

[SEAL.] GEO. W. SPROULE, *Clerk.*

12 UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing papers hereto annexed constitute the Judgment Roll in the above entitled action.

Witness my hand and the seal of said Court at Helena, Montana, this 3rd day of February, A. D. 1910.

[SEAL.] GEO. W. SPROULE, *Clerk.*

(Indorsed:) No. 1327. In the District Court of the United States, District of Montana. The United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Judgment Roll. Filed and entered Feb. 3rd, 1910. Geo. W. Sproule, Clerk.

13 And thereafter, to-wit, on the 17th day of February, 1910, defendant filed his Motion for New Trial herein, said Motion being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Motion for New Trial.

Now comes the defendant, Henry Clairmont, and moves the court to set aside the verdict of the jury and to grant him a new trial herein, for the following reasons:

1. That the United States Grand Jury had no jurisdiction to find or present an indictment in this case.
2. That the court had no jurisdiction to try this action.
3. That the testimony showed that no offense was committed on the Flathead Indian Reservation, nor upon any territory over which the United States had jurisdiction.
4. That there is no jurisdiction of the District Court of the United States, for the District of Montana, to try the alleged offense, for the reason that at the time of the arrest of the defendant he was travelling on a passenger train of the Northern Pacific Railway Company, which said train was on the right of way of said Railway Company; that the defendant had not gotten off of said train, nor attempted to get off of said train, but was still upon the same at the time of his arrest; that he was not upon the Flathead Indian Reservation; that he took no liquor upon the Flathead Indian Reservation, nor did he attempt to introduce any liquor thereon, but
14 at the time of his arrest he was occupying his seat in the railway coach of the passenger train of the Northern Pacific Railway Company, and any liquor found upon him was taken from the defendant before he left the passenger train.
5. That the evidence was insufficient to warrant the jury in finding the defendant guilty.
6. That the court erred in failing and refusing to instruct the jury to acquit the defendant.
7. The court erred in refusing to give the defendant's requests for instructions.
8. The court erred in his instructions to the jury excepted to by the defendant at the time.
9. The court erred in overruling the defendant's motion in arrest of judgment.
10. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.
11. The court erred in passing sentence upon the defendant.
12. Errors in law occurring at the time and excepted to by the defendant.

Said motion is based upon the papers, pleadings and files herein and a bill of exceptions herewith presented, served and filed.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing motion for a new trial and receipt of copy accepted this 17th day of February, 1910.

S. C. FORD,
Ass't United States District Attorney.

Indorsed: Title of Court and Cause. Motion for New Trial. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

15 And thereafter, on the 17th day of February, 1910, an order denying motion for new trial was duly made and entered herein, in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

No. 1327.

UNITED STATES OF AMERICA
vs.
HENRY CLAIRMONT.

This cause came on regularly at this time upon the motion of defendant for a new trial and, after due consideration, it is ordered that said motion be, and the same hereby is denied; and exception noted.

Entered, in open court, February 17th, 1910.

GEO. W. SPROULE, *Clerk.*

16 And thereafter, to-wit, on the 17th day of February, 1910, defendant's bill of exceptions was duly signed, settled, allowed and filed herein, being in the words and figures following, to-wit:

17 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Bill of Exceptions.

Be it remembered that heretofore, to-wit: on the 22nd day of December, 1908, there was presented and filed in this court an indictment against the defendant, which said indictment is in words and figures as follows, to-wit:

UNITED STATES OF AMERICA,
District of Montana, ss:

In the District Court of the United States within and for the District of Montana, of the Term of November, in the Year of Our Lord One Thousand Nine Hundred and Eight.

The Grand Jurors of the United States of America, duly empanelled, sworn and charged to inquire within and for the District of Montana, and true presentment make of all crimes and misdemeanors committed against the laws of the United States within the State and District of Montana, upon their oaths and affirmations do find, charge and present:

That one Henry Clairmont, late of the State and District of Montana, on the 15th day of August, A. D. 1908, at and within the State and District of Montana, did, then and there, wrongfully and unlawfully introduce a large quantity of spirituous and intoxicating liquors, commonly called whiskey, in quantity about one quart, the exact quantity of which is to the Grand Jurors aforesaid un-
18 known, into the Flathead Indian Reservation, in the State and District of Montana, the said Flathead Indian Reservation, then and there, being an Indian country under the charge of Samuel Bellew, then and there the United States Indian Agent and Superintendent in charge of said Flathead Indian Reservation, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

JAS. W. FREEMAN,
United States Attorney, District of Montana.

Endorsed: No. 1327. United States District Court, District of Montana. United States of America v. Henry Clairmont. Indictment: A True Bill. C. A. Whipple, Foreman of Grand Jury. Jas. W. Freeman, United States Attorney, District of Montana. Witnesses: Fred. C. Morgan, Sam Cone, Hugh Montgomery, Joe Matulys, Sam Bellew. Presented by the Grand Jury, in open Court, by their Foreman, and in their presence, and filed this 22 day of Dec., A. D. 1908. Geo. W. Sproule, Clerk. By C. R. Garlow, Deputy. Bail $500. W. H. Hunt, Judge.

19 That thereafter, on the 21st day of January, 1909, the defendant appeared in person and with his counsel and was arraigned, and answered that his true name is Henry Clairmont, and entered a plea of not guilty.

And thereafter, on the 26th day of March, 1909, this cause came on regularly for trial in the above entitled court, before the Hon. William H. Hunt, Judge presiding, when the following proceedings were had, to-wit: A jury was empanelled and sworn to try said cause, and thereupon the United States of America, to maintain the issues on its part, introduced and offered the testimony of the following witnesses:

SAM CONE testified as follows:

My name is Sam Cone; I have headquarters in Salt Lake City, and am special officer of the Interior Department for the suppression of the liquor traffic among the Indians, and was such special officer on the 15th day of August, 1908. I know the defendant, Henry Clairmont, and saw him on the 15th day of August, 1908, a little after twelve o'clock in the night. He was drunk on the train, and I searched him and found a pint of whiskey on his person (witness produced a bottle of whiskey). He had it in the inside pocket of his coat. I got on one train at Missoula and went from there to Arlee and took several prisoners off the train at Arlee, and when the next train came along I got on that train and raided it. This is the defendant here that I arrested upon that occasion. This took place on the Flathead Reservation.

Cross-examination:

I had gone from Missoula to Arlee on Train No. 3. The defendant was on Train No. 5; he was not on the same train I was on; I was on the train ahead of him; I got on his train to make a raid. I did not know he was on that train; I knew some other fellows were on that train; I got on that train to arrest anybody that had whiskey; I got on that train to arrest some other people that I thought were on the train, and I arrested him. I arrested two. The defendant was drunk; the defendant was on the train when I arrested him; he was making no attempt to get off the train at Arlee; he told me he was going to Ravalli. I went on the train and found Clairmont on the train, and found out where he was going; then I searched him and found this liquor and took him off the train; that was all there was to it; that is the identical bottle that I took off him; I labeled it and delivered possession of this bottle of whiskey to the United States Marshal; I had it in my grip in my room, with a dozen other bottles; I saw this bottle of whiskey again along about the 20th of December; that is the only time I have seen the bottle since I delivered it to Mr. Haigler, I appeared before the grand jury. I made a good many arrests, and took a good many bottles from different individuals during the month of August. I made probably one hundred and fifty arrests; maybe more than that. I didn't let the defendant go on to Ravalli. When I took this whiskey from him I took it from him there on the train; I put it in my own pocket; when I got off the train at Arlee and took the defendant off the train the defendant didn't have any whiskey on him at all; I arrested him there and took him back to Missoula that night and put him in jail.

Redirect examination:

This bottle is in the same condition now that it was when I sealed it.

By Mr. FREEMAN: We offer this bottle of whiskey in evidence at this time.

By Mr. MCCONNELL: We object to the introduction of this bottle, if the court please, as incompetent and immaterial.

The COURT: Let it be admitted.

By Mr. MCCONNELL: Note an exception to the ruling of the Court.

21 JOE J. MATULYS, called as a witness on behalf of the Government, testified as follows:

My name is Joe J. Matulys; I have headquarters at Salt Lake City, Utah; am United States special officer for the suppression of the liquor traffic among the Indians; I am acquainted with the defendant, Henry Clairmont; saw him on or about the 15th day of August, 1908. I went with Mr. Cone on the first train, and after we had made the different arrests we went out and saw the second train coming in and Mr. Cone and I boarded that train, and we saw Henry Clairmont. He said he was going to Ravalli. Mr. Cone searched him and found this bottle of whiskey. After Cone had taken the bottle of whiskey from Clairmont he stuck it in his pocket; then we took him off the train and went in to the depot at Arlee. Mr. Cone took care of the bottle of whiskey during the preliminary hearing, where we had it up for evidence.

Cross-examination:

A man by the name of Ashley and a man by the name of Raymond were arrested at the time we arrested Clairmont; bottles of whiskey were taken off of them; there must have been about fifteen bottles, varying in size; I could not tell how much whiskey was in them; I would not undertake to identify this bottle as the one taken from Clairmont without the label; that label was put on at Arlee. Mr. Cone had several bottles that he took from these people when he came from the train, and I had several that night, when we were arresting so many men, and the train only stopped there a minute, and we took fifteen bottles; I don't mean to say that I marked them all, not at the time.

We had made a raid on the first train that came through there. We started out with about twenty that we had got off the first train, but when we landed in the depot we had about ten. Ten of them got away. We destroyed a good many of the bottles
22 that we took off these fellows; when a man had more than one bottle we only saved one for evidence. We didn't destroy the bottle that we took off Clairmont, because it was the only one he had. We made twenty arrests on the first train and three arrests on the next train; we arrested twenty-three that night, but we had only about fifteen bottles of whiskey. I don't remember now whether there were eight that we didn't find bottles on at all. During the month of August, 1908, I arrested, or assisted in arresting, probably one hundred or so. Since August I have arrested or assisted in arresting, about twenty-five.

Redirect examination:

I tasted the contents of this bottle; it contained whiskey.

H. H. MONTGOMERY, a witness on behalf of the Government, testified as follows:

My name is H. H. Montgomery; I live in Missoula, and I am clerk for the Northern Pacific Railway Company. I remember when some of the arrests were made on the 15th of August last; I remember when Mr. Cone and Mr. Matulys brought Henry Clairmont into the depot, where I was, with a number of other prisoners; he was taken back to Missoula on the train that got into Missoula about three o'clock; I saw Mr. Cone mark a bottle there at the ticket window.

Cross-examination:

I saw Mr. Cone mark the bottle there that night, just one for Clairmont. There were suit cases there with liquor in them; he had several suit cases and telescopes; some of the bottles were in suit cases; some of them he broke and some he marked; this is the only one he marked with a label. I saw probably forty bottles there that night; they were in suit cases; there was a dozen bottles in a suit case, with the number of the bottle, I saw there that night, I am not able, outside the label that is on the bottle, to identify it
23 as the bottle that was taken from Henry Clairmont. Clairmont was so intoxicated he lay down on the floor and went to sleep. I just went along with Cone and Matulys to see the fun; they told me they were going to gather them in; they did get about twenty-five in the raid. I guarded eight men; a part of the arrests were made about 10:30, and some of them were made around 12 o'clock at night.

SAMUEL BELLEW, a witness on behalf of the Government, testified as follows:

My name is Samuel Bellew. On the 15th day of August, 1908, I was Indian Agent for the Flathead Reservation. I know the defendant Henry Clairmont; he lives upon the Indian Reservation, about four or five miles from Ronan; the railroad station where he would get off would be Ravalli; that station is on the Reservation, and also on the right of way; the town of Arlee, or station of Arlee, is also on the Reservation.

The Government then rested its case, and thereupon the attorney for the defendant moved the court to instruct the jury to return a verdict acquitting the defendant, for the reason that it appears from the testimony of the Government that the liquor was taken from the defendant while he was on a train of the Northern Pacific Railway Company, and not on the Reservation, and it was not shown that he intended to introduce liquor upon the Reservation.

Which motion the court then and there overruled and required the defendant to introduce proof, to which ruling of the court the defendant then and there duly excepted.

Defendant's Case.

HENRY CLAIRMONT, a witness in his own behalf, testified as follows:

My name is Henry Clairmont and I live on the Flathead Reservation with my family, consisting of my wife and two chil-
24 dren. I own and cultivate one hundred and eighty acres of land; I have lived there about twenty years; I am now twenty-three years old. I was on the train when I was arrested by Mr. Cone. I was coming from Missoula. I had been in Missoula about five or six days. I brought my wife in there and took her to a doctor for an operation. I had been up quite a bit since I had been there, and lost quite a lot of sleep, and was feeling pretty tired the night I was going to leave to go back. I had left my little child at home, and I was going back after her after the operation was performed, and I was feeling pretty tired, and I thought I would take a little bracer with me to go on the train. I had quite a long trip ahead of me, and thought I would take this little bracer with me as long as I was on the train, not intending to take it off the train with me; I intended to drink that on the train.

I bought a half pint of whiskey in Missoula, it was in a plain bottle or flask; I paid two bits for it. After I got on the train I had the bottle in my pocket and I took about three or four drinks out of it, good sized drinks; I gave a drink to another fellow; he took a pretty good drink; it seems that he was pretty dry. When I was arrested by Mr. Cone there was left in the half pint flask not more than two drinks. It was ten miles from Arlee to Ravalli. My intention was to drink the balance of this whiskey before I got to Ravalli, before I got off the train. So far as I can see about this bottle, it is not the bottle I bought, because this bottle is full, and the bottle they took from me wasn't more than about three fingers or two fingers and a half left in the flask; when they took it away from me it was not as nearly full as this bottle. This is not the bottle that was used in the preliminary hearing against me before the Commissioner in Missoula. The bottle they had there in Missoula
25 and used against me was about half full, or nearly half full, as near as I can judge.

Cross-examination:

I do not think the bottle they had at Missoula was the bottle they took from me. I don't think I ever saw the bottle they took off me afterwards. I was not drunk that night. I didn't lie down on the floor, but I sat down there on the floor because I was pretty tired; my feet were sore, because I had been on my feet so much and I was tired and I sat down. I bought a half pint of whiskey; I had paid two-bits for it; I did not buy a couple of bottles; I took the last drink on the train between Missoula and Arlee; I needed a bracer to keep me up, because I had about thirty-five miles ahead of me, a trip of thirty-five miles to drive in a rig from the station to my home. I expected to brace up with this half pint of whiskey, and I thought I

would be in good condition by the time I got ready to make this drive of about thirty-five miles.

Defendant rests.

Rebuttal.

SAM CONE, recalled as a witness for the Government, testified as follows in rebuttal:

I didn't take any half pint bottle from Mr. Clairmont at all; that is the bottle right there that I took from him. When I got into the depot, when we took the other men from the train, all the bottles we took from them were labeled, and when I arrested Mr. Clairmont I didn't have any other bottle on my person at all except the bottle I took from him. If he had a half pint bottle I didn't see it; the only bottle on him was full, or almost full; this is the same bottle that was used before the Commissioner.

26 Cross-examination:

We took eight bottles from Ashley that night and one from Raymond. I am probably wrong about the kind of bottles taken from them.

JOE J. MATULYS, recalled on behalf of the Government, testifies as follows:

I didn't see any half pint bottle with about two fingers of whiskey in it, taken from the defendant; that is the only bottle that I saw Mr. Cone take from Clairmont that night. This is the only bottle I saw introduced in the Clairmont case at Missoula.

H. H. MONTGOMERY, recalled on behalf of the Government, testified as follows:

I was at the preliminary examination of the defendant at Missoula. There was not any bottle introduced in his case that was simply half full of whiskey; the one introduced before the Commissioner down at Missoula is similar to this.

Whereupon the Government rested its case.

This was all the testimony introduced in the case.

And thereupon the defendant respectfully requested the court to give the jury the following instructions:

Requests for Instructions.

I. The jury are instructed in this case that the law does not require that the defendant prove himself innocent of the crime charged against him, but the law imposes upon the Government to prove that the defendant is guilty in manner and form as charged in the indictment to the satisfaction of the jury beyond a reasonable doubt, and unless the Government has done so, the jury should find the defendant not guilty.

II. The jury are instructed that the indictment in this case is

of itself a mere accusation or charge against the defendant,
27 and is not of itself any evidence of the defendant's guilt, and no juror in this case should permit himself to be to any extent influenced against the defendant because or on account of the indictment in this case.

III. You are instructed that the defendant is presumed to be innocent of the crime charged, and this presumption of innocence is not a mere form to be disregarded by the jury at pleasure, but it is an essential, substantial part of the law of the land, and binding on the jury in this case; and it is the duty of the jury to give the defendant in this case the full benefit of any presumption and to acquit the defendant, unless they feel compelled to find him guilty as charged by the law of the land and the evidence in the case, convincing them of his guilt as charged beyond a reasonable doubt.

IV. You are instructed that mere probabilities are not sufficient to warrant conviction; nor is it sufficient that the greater weight or preponderance of the evidence supports the allegations of the indictment; nor is it sufficient that upon the doctrine of chance it is more probable that the defendant is guilty. To warrant a conviction of the defendant, he must be proved to be guilty so clearly and conclusively that there is no reasonable theory upon which he can be innocent, when all the evidence in the case is considered together.

V. You are instructed that under the law no jury should convict a person of crime upon mere suspicion, however strong, or simply because there is a preponderance of all the evidence in the case against him, or simply because there is a strong reason to suspect that he is guilty; but before the jury can lawfully convict they must be convinced of the defendant's guilt beyond a reasonable doubt.

VI. You are instructed that in this case the burden of proof rests upon the Government to make out and prove to the satisfac-
28 tion of the jury, beyond a reasonable doubt, every material allegation in the indictment, and unless that has been done, the jury should find the defendant not guilty.

VII. You are instructed that before you can convict the defendant, you must be satisfied beyond a reasonable doubt:

That liquor was actually introduced by him upon the Indian Reservation.

That he intended to take the liquor upon the reservation.

That he owned the liquor, or had charge of it, or was in possession of it for the purpose of introducing it upon the Indian Reservation.

VIII. If you believe from the evidence that the liquor was taken away from the defendant while on a Northern Pacific train, and that as a matter of fact the liquor was not taken by the defendant upon the reservation, then you should find the defendant not guilty.

Filed and entered March 26, 1908.

GEO. W. SPROULE, *Clerk.*

All of which the court refused, to which the defendant duly excepted.

And thereupon the case was argued to the jury by respective counsel, and the court instructed the jury as follows:

Instructions Delivered Orally by William H. Hunt, Judge.

GENTLEMEN: I will read to you the statute, so far as it is applicable, under which this indictment is drawn: "Any person who shall introduce or attempt to introduce any malt, spirituous or vinous liquor, including beer, ale and wine, or any ardent or intoxicating liquor of any kind whatsoever, into the Indian country shall be punished by imprisonment for not less than sixty days, and by a
29 fine of not less than one hundred dollars, for the first offense, and not less than two hundred dollars for each offense thereafter."

The indictment charges the defendant with having, on August 15, 1908, introduced a large quantity of spirituous and intoxicating liquor, commonly called whiskey, the exact quantity of which was to the Grand Jurors unknown, into the Flathead Indian Reservation. The quantity is immaterial, provided you find from the evidence that there was, as the law defines, an introducing of the quantity stated or any less quantity of whiskey.

My view of this statute has been expressed a number of times. It is a very severe statute. I don't think the intent of the man introducing the liquor has anything to do with it. There are certain laws passed by governments which make acts themselves unlawful, irrespective of intent. One of the easiest illustrations is in city ordinances. If I tie my horse on main street, or leave him with a weight, I am probably violating a city ordinance; (I take it that there is such an ordinance in Helena; there is in most cities); and if I am arrested, it is no defense to say that I did not intend to violate the law. And so here, the only question in this case is whether or not there was an introduction of the liquor as charged. A man might be so drunk he didn't know what he was doing, and yet, if he introduces liquor into an Indian country, he is guilty. If convicted, he might have ample ground to appeal to the mercy of the court for a light sentence, but that is a matter that is neither here nor there. The question is, did he introduce the liquor charged, or any part of it, into the Indian country.

I have also had occasion to pass upon what is Indian country. I have expressed the opinion that a man is guilty of a violation of this statute who takes liquor upon the Great Northern right of way within the Blackfoot Indian Reservation, if he intends there to use
30 it, or to barter it, or to sell it. The Northern Pacific dining cars carry liquors in crossing a reservation, but that is not introducing the liquors into a reservation, because the Northern Pacific is engaged in interstate commerce and is simply crossing a reservation without intent to engage in the consumption, or barter, or sale of liquor in the Indian country. So a merchant selling liquor at Missoula, to one not in the reserve, might ship his liquor by way of Ravalli to the foot of the Flathead Lake by the carrier or stage which transports freight from Ravalli across the reservation to Polson at

the foot of the Flathead Lake. That is not introducing liquor into the reservation in the sense that the law means. But if any one of us should go upon the reservation, even for recreation, and take with us whiskey, or vinous liquor, or malt, or beer, or other intoxicants, for the purpose of using it, or bartering it, or selling it, or consuming it, on the reservation, we would be guilty, whether we intended to violate the law or not. So, in this, if this defendant, carrying this whiskey, started from Missoula for Ravalli, and if Ravalli was within the limits of the reservation, and his purpose was to use the whiskey, and take it upon the reservation, there to keep it for himself, or to use it on the reservation, there is guilt. I do not see how any other view of the law could well be taken. I cannot believe that the United States Government ever intended to permit traffic all along the right of way of the Northern Pacific, within the reservation, in whiskey, or other liquor. If that be the law, we might have saloons all along the right of way; the Indians could stop off what might be called the main reservation, right beside the track, get drunk, and the man who sold them liquor could not be indicted by the United States, and the Indians could not be indicted. I do not believe that that is a correct interpretation of the law. I think that, in these police regulations, the question of intent has nothing to do
31 with the matter. It is simply a question whether or not the whiskey was taken into the reservation, as explained to you.

The defendant is presumed to be innocent, and the burden rests upon the Government to prove by competent evidence, to your satisfaction, beyond a reasonable doubt, that the defendant introduced the liquor, as charged in the indictment. You must have an abiding conviction to a moral certainty that the charge is true and has been proven to be true by the evidence that you have heard, in order to convict the defendant. If you are satisfied beyond a reasonable doubt of the truth of the charge, your sworn duty is to convict. If you are not so satisfied, your sworn duty is to acquit. If you convict, you have nothing to do with the punishment. All twelve of you must concur in any verdict rendered.

(Addressing counsel:) You may dictate your exceptions to the stenographer.

By Mr. McConnell: The defendant desires to except to the instructions of the court on the question of intent, and also to the instruction of the court as to what is the Indian country, and particularly to the instruction of the court to the effect that a party upon a Northern Pacific train, having whiskey in his possession, even though he may be going to some point on the reservation, though he has not yet left the train, is introducing liquor upon the reservation. We also except to the refusal of the court to give each and all of the instructions requested by the defendant to be given.

And thereafter the jury returned into court the following

Verdict.

We, the jury in the above entitled action, find the above named defendant guilty in manner and form as charged in the indict-

ment, and we respectfully recommend the defendant to the
32 mercy of the court.

C. W. FLEMMING, *Foreman.*

And thereafter, on the 27th day of March, 1909, and before the sentence of the court, the defendant made a motion in arrest of judgment, which said motion is as follows:

(Title of Court.)

(Title of Cause.)

Motion in Arrest of Judgment.

Now comes the defendant, Henry Clairmont, in his own proper person, the court being about to pronounce sentence and judgment upon the verdict of the jury, returned into court in this cause, and moves the court to arrest the judgment upon the indictment upon which this defendant was found guilty by the jury, and assigns as reasons why the judgment should be arrested the following, to-wit:

1. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

2. The court erred in failing and refusing to instruct the jury to acquit the defendant.

3. That it appears from the evidence that the defendant was on a train of the Northern Pacific Railway Company at the time he was arrested, and at the time it is alleged the liquor was found upon his person, and it was not shown that he had introduced, or attempted to introduce the same upon an Indian reservation at the time said liquor was taken from him.

4. At the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula on a train of the Northern Pacific Railway Company; had not gotten off said train, or attempted to get off of said train, but was still upon the same; had not been upon the Flathead Indian Reservation, or intro-
33 duced, or attempted to introduce, any liquor thereon, but was occupying his seat in the railway coach of said Northern Pacific train.

5. That at the time of the arrest of the defendant the said defendant was on a train of the Northern Pacific Railway Company, which said train was on the right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America, and by the United States of America, by Act of Congress, had been dedicated and given to said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

6. That the United States of America had no power or authority over any offense committed on said train of the Northern Pacific Railway Company by the defendant, but the sole and exclusive

jurisdiction of any offense committed upon said train was in the State of Montana.

HENRY CLAIRMONT.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing acknowledged & copy received this 27th March, 1909.

S. C. FORD,
Ass't U. S. Att'y.

Filed March 27th, 1909.

GEO. W. SPROULE, *Clerk.*

34 Thereupon the cause was submitted upon the motion in arrest of judgment and the court took the same under advisement, and thereafter, on the 20th day of January, 1910, the court ordered that said motion be, and the same was denied, to which ruling of the court the defendant then and there duly excepted, and exception was noted.

Thereafter, on the 3rd day of February, 1910, the court entered a judgment and order adjudging that the defendant, Henry Clairmont, be confined and imprisoned in the county jail of Lewis and Clark County, Montana, for the term of sixty days, and that he pay a fine of one hundred dollars, to which judgment and sentence of the court the defendant then and there duly excepted.

Thereafter the defendant interposed a motion for a new trial, which said motion for a new trial is as follows: to-wit:

(Title of Court.)

(Title of Cause.)

Motion for a New Trial.

Now comes the defendant, Henry Clairmont, and moves the court to set aside the verdict of the jury and to grant him a new trial herein, for the following reasons:

1. That the United States Grand Jury had no jurisdiction to find or present an indictment in this case.

2. That the court had no jurisdiction to try this action.

3. That the testimony showed that no offense was committed on the Flathead Indian Reservation, nor upon any territory over which the United States had jurisdiction.

4. That there is no jurisdiction of the District Court of the United States, for the District of Montana, to try the alleged offense, for the reason that at the time of the arrest of the defendant he was traveling on a passenger train of the Northern Pacific Railway Company, which said train was on the right of way of said Rail-

35 way Company; that the defendant had not gotten off of said train, or attempted to get off of said train, but was still upon

the same at the time of his arrest; that he was not upon the Flathead Indian Reservation; that he took no liquor upon the Flathead Indian Reservation, nor did he attempt to introduce any liquor thereon, but at the time of his arrest he was occupying his seat in the railway coach of the passenger train of the Northern Pacific Railway Company, and any liquor found upon him was taken from the defendant before he left the passenger train.

5. That the evidence was insufficient to warrant the jury in finding the defendant guilty.

6. That the court erred in failing and refusing to instruct the jury to acquit the defendant.

7. The court erred in refusing to give the defendant's requests for instructions.

8. The court erred in his instructions to the jury excepted to by the defendant at the time.

9. The court erred in overruling the defendant's motion in arrest of judgment.

10. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

11. The court erred in passing sentence upon the defendant.

12. Errors in law occurring at the time and excepted to by the defendant.

Said motion is based upon the papers, pleadings and files herein and a bill of exceptions herewith presented, served and filed.

O. W. McCONNELL,
Attorney for Defendant.

Service of the foregoing motion for a new trial and receipt of copy accepted this 17th day of February, 1910.

S. C. FORD,
Ass't United States District Attorney.

36 The court overruled the defendant's motion for a new trial, to which ruling of the court the defendant then and there duly excepted.

And thereafter the court granted the defendant to and including the 19th day of February, 1910, in which to prepare, serve and file a bill of exceptions in this cause.

And now, in furtherance of justice, and that right may be done, the defendant, Henry Clairmont, tenders and presents the foregoing as his bill of exceptions in this cause to the action of the court, and prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done this the 17th day of February, 1910.

WILLIAM H. HUNT,
District Judge.

Service of the foregoing Bill of Exceptions acknowledged and copy received this 17th day of February, 1910.

S. C. FORD,
Ass't U. S. Att'y.

Indorsed: Title of Court and Cause. Bill of Exceptions. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

37 And thereafter, to-wit, on February 17th, 1910, a Certificate as to jurisdiction was duly issued herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Certificate as to Jurisdiction.

In this cause I hereby certify that the issue involved in this cause is a question of jurisdiction, and the verdict, judgment and sentence of the court in this cause against the defendant is based upon the ruling of the court, that the United States of America has jurisdiction, and the motion in arrest of judgment and the sentence imposed were decided solely on the ground that the United States of America had jurisdiction in said cause, and the issue presented by the defendant was that the United States of America had no jurisdiction.

This certificate is made in conformity to the laws of Congress of March 3, 1891, Chapter 517. There was no written opinion filed herein.

Dated this 17th day of February, 1910.

WILLIAM H. HUNT,
District Judge, Holding the District Court of the United States for the District of Montana.

Indorsed: Title of Court and Cause. Certificate as to Jurisdiction. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

38 And thereafter, to-wit, on the 17th day of February, 1910, defendant filed his Assignment of Errors herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Assignment of Errors.

The defendant in this action in connection with his petition for a writ of error, specifies and makes the following assignment of errors which he avers exist:

1. The court erred in refusing to instruct the jury to return a verdict acquitting the defendant at the close of all of the testimony for the government, for the reason that it appeared from the testimony of the government that the liquor alleged to have been introduced upon the Flathead Indian Reservation was taken from the defendant while he was on a Northern Pacific Railway Company train; and that he was not on the Flathead Indian Reservation, and it was not shown that the defendant intended to introduce any liquor upon the Flathead Indian Reservation.

2. The court erred in overruling the defendant's motion in arrest of judgment.

39 3. The court erred in failing and refusing to discharge the defendant, for the reason that the United States of America had no jurisdiction of this action and no offense was committed by the defendant on territory within the jurisdiction of the United States, for the following reasons:

(*a*) That at the time of the alleged offense charged in the indictment the defendant was travelling from the City of Missoula, Montana, on a passenger train of the Northern Pacific Railway Company; that he had not gotten off of said train, or attempted to get off of said train, but was still upon the same at the time of his arrest; that he had not been upon the Flathead Indian Reservation with any liquor or introduced, or attempted to introduce any liquor thereon, but was occupying his seat in the railway coach of the train of the Northern Pacific Railway Company as a passenger thereon.

(*b*) That at the time of his arrest the defendant was on a train of the Northern Pacific Railway Company, which said train was on the right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America and by the United States of America, by Act of Congress, had been dedicated and given to the said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest and at the time of the alleged commission of the offense with which he is charged for any offense committed on said train.

(*c*) That the United States of America had no jurisdiction and no power or authority to punish for any offense committed on the train of the Northern Pacific Railway Company by the defendant, but that the jurisdiction of any offense so committed upon said train was in the State of Montana.

40 4. The court erred in its instruction to the jury as to what constitutes the Flathead Indian Reservation, and in instructing the jury that a person upon a Northern Pacific Railway train crossing the Flathead Indian Reservation, and on the right of way of said Railway Company was subject to the jurisdiction of the United States.

5. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

6. The court erred in passing sentence upon the defendant.

7. The United States Grand Jury had no jurisdiction to present an indictment in this case.

Wherefore, the defendant, Henry Clairmont, prays that the judgment be reversed.

O. W. McCONNELL,
Attorney for Defendant.

Indorsed: Title of Court and Cause. Assignment of Errors. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

41 And thereafter, to-wit, on February 17th, 1910, a Petition for Writ of Error was filed herein, being in the words and figures following, to-wit:

In the District Court of the United States, District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Petition for Writ of Error.

Now comes the defendant, Henry Clairmont, and petitions this court for a writ of error herein and says:

That on or about the 3rd day of February, 1910, the above entitled court entered a judgment herein against the defendant, wherein the defendant was sentenced to sixty days in jail and to pay a fine of one hundred dollars for the alleged offense of introducing liquor upon the Flathead Indian Reservation; that in said judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors, which is filed with this petition.

Wherefore, this defendant prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors so complained of, and that a transcript of the record, proceedings and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

O. W. McCONNELL,
Attorney for Defendant.

Indorsed: Title of court and cause. Petition for Writ of Error. Filed Feb. 17, 1910. Geo. W. Sproule, Clerk.

42 And thereafter, to-wit, on the 17th day of February, 1910, an order allowing writ of error was duly made and entered herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Order Allowing Writ of Error.

On this, the 17th day of February, 1910, comes the defendant, by his attorney, and files herein and presents to the court his petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by him, and praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error, upon the defendant giving bond according to law in the sum of Five Hundred Dollars, which shall operate as a supersedeas bond.

WILLIAM H. HUNT,
District Judge.

Indorsed: Title of court and cause. Order Allowing Writ of Error. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk.

43 And thereafter, to-wit, on the 17th day of February, 1910, a bond on writ of error was duly filed herein, being in the words and figures following, to-wit:

In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Bond.

Know all men by these presents: That we, Henry Clairmont, as principal, and the United States Fidelity and Guaranty Company, of Baltimore, Maryland, as surety, are held and firmly bound unto the United States of America in the full and just sum of Three Hundred Dollars, to be paid to the United States of America, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, successors and assigns, jointly and severally by these presents.

Sealed with our seals and dated this 17th day of February, 1910.

Whereas, lately, at a District Court of the United States for the District of Montana, in a suit depending in said court between the

United States of America, as Plaintiff, and Henry Clairmont, as defendant, a judgment was entered against the defendant, sentencing him to sixty days in jail and to pay a fine of One Hundred Dollars; and,

Whereas, the defendant, Henry Clairmont, is desirous of prosecuting an appeal from the judgment and sentence of said United
44 States District Court to the Supreme Court of the United States, and has obtained a writ of error and filed a copy thereof in the Clerk's office of said District Court of the United States to reverse the judgment in the aforesaid suit, and a citation, directed to the United States of America and Geo. W. Wickersham, Attorney General of the United States, citing and admonishing said parties to be and appear at a session of the Supreme Court of the United States, to be held at the City of Washington, District of Columbia, within sixty days from the 17th day of February, 1910.

Now, the condition of the above obligation is such that if the said defendant, Henry Clairmont, shall prosecute said writ of error to effect and answer all damages and costs if he fail to make the said appeal good, then the above obligation to be void, else to remain in full force and virtue.

HENRY CLAIRMONT. [SEAL.]
UNITED STATES FIDELITY AND GUARANTY COMPANY,
By CLINTON O. PRICE, *Attorney in Fact.*

[CORPORATE SEAL.]

Signed, sealed and delivered in the presence of
CHAS. B. COLEMAN.

The bond on writ of error in this case is hereby fixed at the sum of three hundred dollars, and the above bond in that amount, with the foregoing surety, is hereby approved.

WILLIAM H. HUNT, *Judge.*

Indorsed: Title of court and cause. Bond. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk.

45 And thereafter, to-wit, on the 17th day of February, 1910, a Writ of Error was duly issued herein, which said Writ of Error with return thereof is hereto annexed, being in the words and figures following, to-wit:

46 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Writ of Error

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Judge of the District Court of the United States for the District of Montana, Greeting:

Because in the records and proceedings, and also in the rendition of the judgment and the sentence of the court, wherein the defendant was sentenced to sixty days in jail and to pay a fine of One Hundred Dollars for the alleged violation of Section 2139 of the Revised Statutes of the United States, for introducing liquor upon the Flathead Indian Reservation, a manifest error has happened, to the great damage of said Henry Clairmont, as appears from the papers herein; we being willing that the error, if any has been committed, should be duly corrected and full and speedy justice done to the party aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the records and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the City of Washington, District of Columbia, on the 18th day of
47 April, 1910, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Hon. Melville W. Fuller, Chief Justice of the United States, the fifteenth day of February, in the year of our Lord one thousand nine hundred and ten, and of the Independence of the United States of America the one hundred and thirty-fourth.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE,
Clerk of the Circuit Court of the United States for the District of Montana.

The above writ of error is hereby allowed by

WILLIAM H. HUNT,
District Judge.

48 *Return to Writ of Error.*

Answer of Court to Writ of Error.

The Answer of the Honorable the United States District Judge for the District of Montana to the Foregoing Writ.

The record and proceedings whereof mention is made, with all things touching the same, I certify, under the seal of said District Court, to the Supreme Court of the United States, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

49 [Endorsed:] No. 1327. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Writ of Error. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk. O. W. McConnell, Attorney for Defendant.

50 And thereafter, to-wit, on the 17th day of February, 1910, a Citation was duly issued herein, which said Citation is hereto annexed and is in the words and figures following, to-wit:

51 In the District Court of the United States for the District of Montana.

UNITED STATES OF AMERICA, Plaintiff,
vs.
HENRY CLAIRMONT, Defendant.

Citation

UNITED STATES OF AMERICA, *ss:*

To George W. Wickersham, Attorney General of the United States, and to the United States of America, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, sixty days from the date hereof, pursuant to a writ of error filed in the Clerk's office of the District Court of the United States, for the District of Montana, wherein the United States of America is plaintiff and Henry Clairmont is defendant, to show cause, if any there be, why the judgment and sentence of the court rendered against the defendant, as in the said writ of error mentioned, should not be corrected and speedy justice be done to the said defendant, Henry Clairmont, in that behalf.

Given under my hand in the City of Helena, in the District of Montana above named, this seventeenth day of February, in the year of our Lord one thousand nine hundred and ten.

WILLIAM H. HUNT,
Judge of the District Court of the United States, District of Montana.

52 [Endorsed:] No. 1327. In the District Court of the United States for the District of Montana. United States of America, Plaintiff, vs. Henry Clairmont, Defendant. Citation. Filed and entered Feb. 17, 1910. Geo. W. Sproule, Clerk. O. W. McConnell, Attorney for Defendant.

53 *Clerk's Certificate to Transcript of Record.*

UNITED STATES OF AMERICA,
District of Montana, ss:

I, Geo. W. Sproule, Clerk of the United States District Court for the District of Montana, do hereby certify and return to the Honorable, the Supreme Court of the United States, that the foregoing volume, consisting of 53 pages, numbered consecutively from 1 to 53, inclusive, is a true and correct transcript of the pleadings, process, orders, verdict, judgment, and all proceedings had in said cause, and of the whole thereof, as appears from the original records and files of said Court in my possession as such Clerk; and I further certify and return that I have annexed to said transcript and included within said paging the original writ of error and citation issued in said cause.

I further certify that the costs of the transcript of record amount to the sum of Forty-two and 50/100 Dollars ($42.50), and have been paid by the plaintiff in error.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Helena, Montana, this 24th day of February, A. D. 1910.

[Seal United States District Court, District of Montana, 1890.]

GEO. W. SPROULE, *Clerk.*

Endorsed on cover: File No. 22,079. Montana D. C. U. S. Term No. 239. Henry Clairmont, plaintiff in error, vs. The United States. Filed March 29th, 1910. File No. 22,079.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1911.

HENRY CLAIRMONT,

Plaintiff in Error.

vs.

THE UNITED STATES,

Defendant.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The plaintiff in error, Henry Clairmont, was indicted by the United States Grand Jury, for the District of Montana, charged with having introduced liquor upon the Flathead Indian Reservation in Montana on the 15th day of August, 1908. To this indictment the defendant below entered a plea of not guilty, and the case came on regularly for trial before a jury. Whereupon testimony was introduced, showing that the plaintiff in error, Henry Clairmont, boarded a train of the Northern Pacific Railway Company at Missoula, Montana, having purchased a ticket to Ravalli, Montana, his destination. While sitting in his seat on the train of the Northern Pacific Railway

Company, when the train reached the town of Arlee, a station on the line of the Northern Pacific Railway Company, some miles distant from Ravalli, the place where the plaintiff in error was going, an officer of the Interior Department boarded said train and arrested the plaintiff in error as he sat in his seat upon the train. The officer searched the plaintiff in error on the train and found a small flask of whiskey in the inside pocket of his coat, a portion of which had been drunk. The officer immediately took the flask of whiskey from the plaintiff in error and placed it in his own pocket, and took the plaintiff in error under arrest from the train. Arlee, Montana, is a station on the line of the Northern Pacific Railway Company, as likewise is Ravalli, the place to which the plaintiff in error was going, both of said stations being upon the right of way of the Northern Pacific Railway Company, and both places being embraced within the exterior limits of the Flathead Indian Reservation.

When the Government had rested its case, counsel for the defendant, now plaintiff in error, moved the court to instruct the jury to return a verdict acquitting the defendant, for the reason that it appeared from the testimony of the Government that the liquor was taken from the defendant while he was on a train of the Northern Pacific Railway Company, and not on the Indian reservation, and it was not shown that the plaintiff in error had left the train, or attempted to leave the train, or had introduced, or intended to introduce, any liquor upon the Flathead Indian Reservation.

The court overruled the motion of the defendant, and required the defendant to introduce proof, which was done.

The defendant requested the court to give the jury certain instructions. (Tr. pp. 14 and 15.)

Instruction No. VIII, requested by the defendant, was as follows:

> "If you believe from the evidence that the liquor was taken away from the defendant while on a Northern Pacific train, and that as a matter of fact the liquor was not taken by the defendant upon the Indian reservation, then you should find the defendant not guilty."

This instruction, as well as all of the instructions requested by the defendant, were by the court refused, to which the defendant duly excepted.

Counsel for the defendant excepted to the instructions of the court, and particularly to the instruction of the court to the effect that a party upon a Northern Pacific train, having whiskey in his possession, even though he may be going to some point on the reservation, though he has not left the train, is introducing liquor upon the reservation.

The jury returned a verdict of guilty, recommending the defendant to the mercy of the court.

The plaintiff in error, Henry Clairmont, appeared in court in his own proper person and by his counsel, the court being about to pronounce sentence and judgment upon the defendant, and moved the court to arrest the judgment and assigned some six reasons therefor in his written motion in arrest of judgment. (Tr. pp. 18-19.)

The motion in arrest of judgment was denied, to which the defendant duly excepted, and the court sentenced the defendant to sixty days in the county jail of Lewis and Clark County, Montana, and to pay a fine of $100.00, to which judgment and sentence the defendant then and there duly excepted.

Thereupon the defendant interposed a motion for a new trial, setting up some twelve grounds of error. (Tr. pp. 19-20.) The motion for a new trial was by the court overruled, to which the defendant duly excepted.

A bill of exceptions was prepared, allowed, settled and signed, which is set forth in the transcript in this case.

Thereupon the court certified that the issue involved in this cause is a question of jurisdiction. The verdict, judgment and sentence of the court against the defendant was based upon the ruling of the court that the United States of America had jurisdiction, and the motion in arrest of judgment and the sentence imposed were decided solely on the ground that the United States of America had jurisdiction in said cause, and the issue presented by the defendant was that the United States had no jurisdiction. Whereupon the defendant sued out a writ of error to this court and specified the following:

ASSIGNMENT OF ERRORS.

1. The court erred in refusing to instruct the jury to return a verdict acquitting the defendant at the close of all of the testimony for the Goverment, for the reason that it appeared from the testimony of the Government that

the liquor alleged to have been introduced upon the Flathead Indian Reservation was taken from the defendant while he was on a Northern Pacific Railway Company train; and that he was not on the Flathead Indian Reservation, and it was not shown that the defendant intended to introduce any liquor upon the Flathead Indian Reservation.

2. The court erred in overruling the defendant's motion in arrest of judgment.

3. The court erred in failing and refusing to discharge the defendant, for the reason that the United States of America had no jurisdiction of this action, and no offense was committed by the defendant on territory within the jurisdiction of the United States, for the following reasons:—

(a) That at the time of the alleged offense charged in the indictment the defendant was traveling from the City of Missoula, Montana, on a passenger train of the Northern Pacific Railway Company, that he had not gotten off of said train, or attempted to get off of said train, but was still upon the same at the time of his arrest; that he had not been upon the Flathead Indian Reservation with any liquor or introduced, or attempted to introduce any liquor thereon, but was occupying his seat in the railway coach of the train of the Northern Pacific Railway Company as a passenger thereon.

(b) That at the time of his arrest the defendant was on a train of the Northern Pacific Railway Company, which said train was on a right of way of said railway company, which said right of way had been ceded by a treaty of the Flathead Indians to the United States of America and by the United States of America, by an Act of Congress, had been dedicated and given to the said Northern Pacific Railway Company, and the United States of America had no jurisdiction or authority over the defendant at the time of his arrest, or at the time of the alleged commission of the offense with which he is charged, for any offense committed on said train.

(c) That the United States of America had no jurisdiction and no power or authority to punish for any offense committed on the train of the Northern Pacific

Railway Company by the defendant, but that the jurisdiction of any offense so committed upon said train was in the State of Montana.

4. The court erred in its instruction to the jury as to what constitutes the Flathead Indian Reservation, and in instructing the jury that a person upon a Northern Pacific Railway train crossing the Flathead Indian Reservation, and on the right of way of said railway company, was subject to the jurisdiction of the United States.

5. The court erred in holding that the evidence was sufficient to warrant the jury in finding the defendant guilty.

6. The court erred in passing sentence upon the defendant.

7. The United States Grand Jury had no jurisdiction to present an indictment in this case.

ARGUMENT.

The question at issue in this case is as to whether the United States has jurisdiction on the right of way given by the Government to the Northern Pacific Railway Company across the Flathead Indian Reservation. The right of way of said railway company extends across the Flathead Indian Reservation from east to west, and the question for determination in this case is as to whether this right of way of the Northern Pacific Railway Company is a part of the Flathead Indian Reservation, or whether the Government has parted with its title to the right of way so that it does not have jurisdiction over the same.

The plaintiff in error contends that Flathead Indians ceded, by agreement and convention, all of their rights and claims

to the United States for a strip of ground 200 feet in width on each side of the center of the track of the Northern Pacific Railway Company, and the Indians were paid a consideration therefor. We further contend that the United States of America, by Act of Congress, conveyed to the Northern Pacific Railway Company this right of way, giving the railway company the right of exclusive possession and extinguishing the right of occupancy by the Indians, and made no reservation or provisions retaining jurisdiction over the strip or right of way relating to the sale or introduction of liquor thereon. The plaintiff in error contends that the Act of Congress granting the right of way had the effect to convey to the railway company the title in fee to said right of way, so that neither the Indians nor the United States had any title whatever to this strip of ground or any jurisdiction over it; in other words, the plaintiff in error contends that the right of way of the Northern Pacific Railway Company constitutes no part of the reservation.

THE GRANT TO THE RAILWAY COMPANY.

The right of way to the Northern Pacific Railroad Company, the predecessor in interest of the Northern Pacific Railway Company, over the Flathead Indian Reservation was granted by the Act of Congress of July 2, 1864. The grant of the right of way made by Section 2 of said Act is as follows:

"That the right of way through the public lands be,

and the same is hereby, granted to said 'Northern Pacific Railroad Company', its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables and water-stations; and the right of way shall be exempt from taxation within the Territories of the United States. The United States shall extinguish as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill."

13 Statutes-at-Large 365, Chap. 117.

EXTINGUISHMENT OF INDIAN TITLE.

Pursuant to the last clause of Section 2, of the Act of Congress of July 2, 1864, the United States proceeded to extinguish the title of the Flathead Indians to the land across the Flathead Indian Reservation, and there was a convention of the Flathead Indians, by which they agreed to sell to the United States a definite tract of land 200 feet in width on each side of the track for the purpose of a right of way for the Northern Pacific Railroad Company. The minutes of the convention may be found in Executive Document No. 44, Forty-seventh Congress, second session. An agreement was made and entered into between the Flathead Indians and the

United States on September 2, 1882, by which all right and claim of every kind of the Indians to this right of way was extinguished, the consideration therefor being paid by the Northern Pacific Railroad Company.

On July 4, 1884, Congress provided for the payment of the sum of $16,000.00 to the Flathead and other tribes of Indians in Montana Territory for the right of way of the Northern Pacific Railroad Company over and through their reservations, which was "to be paid in accordance with an agreement between the tribes and the United States on September 2, 1882, and being the sum paid to the United States by the Northern Pacific Railroad Company in part payment of said right of way, which agreement is hereby ratified."

23 Statutes-at-Large, p. 89.

The Indian title to the right of way granted to the railroad company was extinguished. It then becomes pertinent to inquire what kind of a title was granted to the Northern Pacific Railroad Company by the Act of Congress of July 2, 1864, whether it was a title in fee, or merely an easement. That the Northern Pacific Railroad Company complied with all of the terms and conditions of the Act of Congress of July 2, 1864, we think is conceded and it is unnecessary to cite the other provisions of this act and the acts of compliance of the railroad company. It is only necessary to ascertain what construction is properly placed upon Section 2 of this act to ascertain the nature of the grant, whether it was in fee or simply an easement.

This court has passed upon and construed this act, and has held:

> "That the *fee* passed by the grant made in Section 2 of the act of July 2, 1864."

In the case of

> Northern Pacific Railway Company vs. Townsend, 190 U. S. 267; 23 Sup. Ct. Rep. 671,

Chief Justice White construed the grant of the Government to the Northern Pacific Railroad Company. In that case the court said:

> "Following decisions of this court construing grants of rights of way similar in tenor to the grant now being considered (New Mexico v. United States Trust Co., 172 U. S. 171; St. Joseph & Denver C. R. Co. v. Baldwin, 103 U. S. 426), it must be held that the fee passed by the grant made in Section 2 of the act of July 2, 1864. * * * * * * *
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> "The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same as long as it was used for the railroad right of way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted. * * * * To repeat, the right of way was given in order that the obligations to the United States, assumed in the acceptance of the act, might be performed. Congress having plainly manifested its intention that the title to, and possession of, the right of way should continue in the original grantee, its successors and assigns, so long as the railroad was maintained, the possession by individuals of portions of the right of way cannot be treated without overthrowing the act of Congress, as forming the basis of an adverse possession which may ripen into a title good as against the railroad company.

"Of course nothing that has been said in anywise imports that a right of way through the public domain within a state is not amenable to the police power of the state."

When the act of July 2, 1864, was passed, the grant by the Government passed the title in *fee* to the land *at that time*, regardless of the fact that the Indians still had the right of occupancy. But, as we have seen, this right of occupancy was given up and all Indian title of every kind was extinguished by the agreement of September 2, 1882.

This court on another occasion decided that the grant by the act of Congress on July 2, 1864, to the Northern Pacific Railroad Company operated to *convey the fee to the company*, in the case of

Buttz vs. Northern Pacific Railroad Co., 119 U. S. 55; 7 Sup. Ct. Rep. 100.

In that case Justice Field said:

"The land in controversy, and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as 'Indian country.' At the time the act of July 2, 1864, was passed, the title of the Indian tribes was not extinguished. But that fact did not prevent the grant of Congress from operating to pass the fee in the land to the company. The fee was in the United States. The Indians had merely a right of occupancy,—a right to use the land subject to the dominion and control of the Goverment. The grant conveyed the fee subject to this right of occupancy. The railroad company took the property with this incumbrance. The right of the Indians, it is true, could not be interfered with or determined except by the United States. * * * * * * * *

> "In the grant to the railroad company, now before us, Congress was not unmindful of the title of the Indians to the lands granted, and it stipulated for its extinguishment by the United States as rapidly as might be consistent with public policy and the welfare of the Indians. In compliance with the pledge thus given, the United States took steps, first, to obtain from the Indians the right to construct railroads, wagon roads and telegraph lines across their lands and to make such other improvements upon them as the interests of the Government might require, and afterwards to obtain a cession of their entire title."

In the case of the right of way across the Flathead Indian Reservation the title in fee of the land was granted to the railroad company by the act of July 2, 1864, and on September 2, 1882, the United States extinguished all of the Indian title or right of occupancy by the Indians to said lands upon a substantial consideration paid by the railroad company to the Indians, thereby giving the railroad company the absolute right and title to the right of way.

This court passed upon a similar grant of a right of way to that given to the Northern Pacific Railroad Company in the construction of the act granting a right of way to the Atlantic & Pacific Railroad Company, in the case of

Territory of New Mexico vs. United States Trust Co., 172 U. S. 186; 19 Sup. Ct. Rep. 131.

In that case the term "right of way" was defined, and it was held that the term did not mean the right of passage merely, but that it conveyed the land itself, and not the right of passage over it. Mr. Justice McKenna, in delivering the opinion of the court, says:

"What, then, is meant by the phrase, 'the right of way?' A mere right of passage, says appellant, per contra, appellee contends that the fee was granted; or if not granted, that such a tangible and corporeal property was granted that all that was attached to it became part of it and partook of its exemption from taxation.

"To support its contention, appellant urges the technical meaning of the phrase 'right of way', and claims that the primary presumption is that it was used in its technical sense. Undoubtedly that is the presumption, but such presumption must yield to an opposing context and the intention of the legislature otherwise indicated. Examining the statute, we find that whatever is granted is exactly measured as a physical thing, not as an abstract right. It is to be 200 feet wide, and to be carefully broadened so as to include grounds for the superstructure indispensable to the railroad.

"The phrase, 'right of way,' besides, does not necessarily mean the right of passage merely. Obviously, it may mean one thing in a grant to a natural person for private purposes, and another thing in a grant to a railroad for public purposes, as different as the purposes and uses and necessities, respectively, are:

"Mr. Justice Blatchford said in Joy vs. St. Louis, 138 U. S. 44, 11 Sup. Ct. 256: 'Now the term, 'right of way', has a two-fold significance. It is sometimes used to describe a right belonging to a party,—a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their roadbed.' That is, the land itself, not a right of passage over it."

Continuing, the court said:

"But, if it may not be insisted that the fee was granted, surely more than an ordinary easement was granted,—one having the attributes of the fee, perpetuity and exclusive use and possession; also the remedies of the fee, and, like it, corporeal, not incorporeal, property. * * * The interest granted by the statute to the Atlantic & Pacific Railroad Company, therefore, is real estate of corporeal property, and the principles of such apply."

Even though the United States had not by treaty and agreement of September 2, 1882, extinguished the right of the Indians to the tract of land for the right of way of the Northern Pacific Railroad Company over the Flathead Indian Reservation, the grant, as contained in the act of Congress, conveying the right of way to the railroad company, operated of itself, to extinguish the Indian right, for the grant by the Government to the railroad for the right of way necessarily involved the possession of the land as a railroad right of way, and this of itself would terminate the Indian right of occupancy. This court in the case of

> Missouri K. & T. Ry. Co. vs. Roberts, 152 U. S. 114; 14 Sup. Ct. Rep. 496,

in construing the act of Congress granting to the southern branch of the Union Pacific Railway Company a right of way, subsequently located through the Osage Indian Reservation, held that:

> "The United States had the right to authorize the construction of the road of the Missouri, Kansas & Texas Railway Company through the reservation of the Osage Indians, and to grant absolutely the fee of 200 feet as a right of way to the company * * * No stipulation was made when the grant of the right of way through the Osage Reservation was made, but the uses to which the lands were to be applied necessarily involved their possession. That grant was absolute in terms, covering both the fee and possession, and left no rights on the part of the Indians to be the subject of future consideration. * * * The right of the United States to dispose of the fee in the land occupied by them, has always been recognized by this court from the foundation of the government."

The case just quoted from this court held that the government had the right and power to dispose of the fee in the lands in controversy occupied by the Osage Indians, together with their right of occupancy, and that the act of Congress granting the right of way, conveyed both the fee and possession of the land to the railroad company.

The grant by Congress of a right of way over the public domain takes effect from the date of the grant and is absolute in character and conveys the whole of the land to the railroad company, to whom the grant is made. Congress granted to the St. Joseph and Denver City Railroad Company a right of way through the public domain. An individual undertook to settle upon a portion of this right of way granted after the act of Congress granting the right of way, but before the definite location of the railroad over it. It was held by this court, in the case of

Railroad Company vs. Baldwin, 103 U. S. 426;

> "That the grant which the act of July 23, 1866, makes to the St. Joseph & Denver City Railroad Company to the extent of 100 feet in width on each side of said railroad where it may pass through the public domain is absolute and *in praesenti*, and a party subsequently acquiring a parcel of such lands takes it subject to that right."

It will be noted that the grant from the Government to the Northern Pacific Railroad Company is *in praesenti*, the language being that the right of way "*is hereby granted* to said Northern Pacific Railroad Company, its successors and assigns."

The parcel of land granted is definite in width and length. The Indian title to the land over the Flathead Indian Reservation was extinguished in the agreement between the Indians and the United States, and for the consideration of several thousand dollars paid by the Northern Pacific Railroad Company for the right of way over the reservation. It would seem that there can be no question but that the United States granted, and the railroad company acquired, an absolute title in fee to the right of way 400 feet in width.

EFFECT OF GRANT.

The effect of the act of Congress granting the right of way over the Flathead Indian Reservation to the Northern Pacific Railroad Company was to *withdraw such right of way from the operation of the former act of reservation.* It eliminated from the Flathead Indian Reservation a strip of land 400 feet wide from the east to the west thereof, through which the railroad ran along its right of way.

In the case of

Maricopa & Phoenix Railroad Co. vs. Territory of Arizona, 156 U. S. 347; 15 Sup. Ct. Rep. 391,

it was held that:

> "An act of Congress granting to a railroad a right of way, and authority to construct and operate a railroad thereon through an Indian reservation, created by Congress, within the limits of a territory previously organized, in the absence of any treaty with the Indians preventing such grant, withdraws the land from the act of reservation, to the extent of the grant and for the purposes thereof,

and re-establishes over the property and rights withdrawn the authority of the territory, including the power to tax."

Mr. Chief Justice White, delivering the opinion of the court in that case, said:

"The consent of Congress to the railroad entering on the land and using it as therein provided, was a valid exercise of power. Its necessary effect was to the extent of the grant and for the purposes thereof to withdraw the land from the operation of the prior act of reservation, and the immediate consequences of such withdrawal, so far as it affected the property and rights withdrawn, was to re-establish the full sway and dominion of the territorial authority."

Railway vs. Fisher, 116 U. S. 28; 6 Sup. Ct. 246.
Harkness vs. Hyde, 98 U. S. 476. * * * * *

"It is wholly immaterial whether the rights vested in the corporation by the act of Congress, were rights of ownership, or merely those which result from the grant of an easement. Whatever they were, they were taken out of the reservation by virtue of the grant and came to the extent of their withdrawal under the jurisdiction of the the territorial authority."

The act of Congress granting this right of way is similar to that granting the right of way to the Northern Pacific Railroad Company. The necessary effect of this grant was to withdraw the land embraced in the right of way granted to the Northern Pacific Railroad Company from the operation of the prior act of reservation. This right of way ceased to be, and was, no longer a part of the Flathead Indian Reservation. The withdrawal was limited to the extent of the grant and for the purposes thereof. The extent of the grant was the full

width of the right of way designated in the grant, or 200 feet in width on each side of the railroad where it passed through the reservation. The purpose of the grant was to confer upon the railroad company a fee simple title and right of ownership and perpetually embracing exclusive possession. The immediate consequence of such withdrawal, so far as it affects the property and right withdrawn, was to establish the full sway and dominion of territorial authority. It is wholly immaterial whether the rights vested in the railroad by the act of Congress were rights of ownership, or merely those which result from the grant of an easement, because, whatever they were, they were taken out of the reservation by virtue of the grant and became, to the extent of their withdrawal, subject to the jurisdiction of territorial authority. Even though the grant may have conveyed only a limited fee, subject to revert to the Government, if the railroad company failed to use the right of way granted for the purposes for which it was granted, as was held in the case of Northern Pacific Railway Company vs. Townsend, supra, still if the railroad company occupies its right of way with its roadbed and its other necessary superstructures, and uses the same for railroad purposes, its fee simple title is as perfect and complete as if no such limitation was attached to it.

Since the Indian title to the land has been extinguished by agreement, and the Government has parted with the legal title to the strip of land embraced in the right of way, there is nothing left in the Government upon which its jurisdiction can

rest. The effect of such grant was to re-establish the full sway and dominion of the State's authority. There was no room for the exercise of the police power of the United States upon this right of way when the authority of the State was re-established. By the grant of this land to the railroad it was withdrawn from the Flathead Indian Reservation and it was no longer a part of. This right of way cannot be considered *Indian country* simply because it was formerly a part of the Indian reservation, for

> "Indian lands cease without any further act of Congress to be *Indian country* after the Indian title has been extinguished."
>
> Bates vs. Clark, 95 U. S. 204, 208, 209.

JURISDICTION.

It is a logical conclusion that the United States has no jurisdiction over the right of way of the Northern Pacific Railway Company across the Flathead Indian Reservation, by reason of the fact that it has granted and conveyed said land covered by the right of way to the railway company. The Indian title has been extinguished. The Indians no longer occupy the land, nor have any right of occupancy. The railway company is in exclusive possession, ownership and control thereof. The land was withdrawn from the Flathead Indian Reservation, and the effect of this withdrawal was to establish the supremacy, authority, sway and dominion of the State of Montana over this right of way. If a crossing is necessary to be established for a highway across the right of way of the

railroad as it crosses the Indian reservation, the jurisdiction rests in the officers of the State to compel the installation of such a crossing. If a crime is committed on the strip of ground covered by the railroad right of way as it passes over the Flathead Indian Reservation, conveyed by the Government to the railroad, the jurisdiction for the punishment of this crime is in the courts of the State of Montana, and not in the courts of the United States. There are many police regulations prescribed by the laws of the State of Montana touching the conduct of railway companies in the operation of their trains. Railroads in Montana are required to slow down and come to a standstill at the crossing of another railroad track. They are required to post notices at each station of the time of arrival and departure of trains. They are required to erect and maintain fences along the line of their roads and to build cattle guards at crossings. There are other regulations governing railroads operating in the State of Montana coming within the scope of what is known as the police power of the State. Would it be contended for a moment that when a train of the Northern Pacific Railway Company crosses the boundary of the Flathead Indian Reservation and enters upon that part of its right of way lying within the geographical limits of the reservation, that the railway company is instantly freed from the operation of these police regulations? Would it be contended that the railway company passing through this reservation on its right of way, to which it has complete control, is subject only to the police power of

the United States? There can be no divided sovereignty. Either the State of Montana has jurisdiction over this right of way or the United States has.

> "The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all state legislation."
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> Ex parte Dick, 141 Fed. 5.

In speaking of the limit of the police powers of the General Government, the Supreme Court of the United States said, in the case of

> In re Heff, 197 U. S. 505; 25 Sup. Ct. Rep. 506:
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> "In this Republic there is a dual system of government, —National and State. Each within its own domain is supreme, and one of the chief functions of this court is to preserve the balance between them, protecting each in the powers it possesses, and preventing any trespass thereon by the other. The general police power is reserved to the states, subject, however, to the limitation, that in its exercise the state may not trespass upon the rights and powers vested in the General Government. The regulation of the sale of intoxicating liquors is one of the most common and significant exercises of the police power. And so far as it is an exercise of the police power it is within the domain of state jurisdiction."

The court further says in this case:—

> "It will not be doubted that an act of Congress attempting as a police regulation to punish the sale of liquor by one citizen of a state to another within the territorial limits of that state would be an invasion of the state's jurisdiction and could not be sustained; and it would be immaterial what the antecedent status of either buyer or seller was. There is in these police matters no such thing as a divided sovereignty. Jurisdiction is vested entirely in either the state or the nation, and not divided between the two."

One of the police regulations of the State of Montana is that there shall be no drinking upon any passenger train of a railroad company, and power and authority is given the conductors of railroad trains to make arrest of any person violating this penal statute of the State. If, then, the defendant, Henry Clairmont, was drinking upon the train of the Northern Pacific Railway Company at and prior to his arrest by a Federal officer, he could have been arrested under the State law, but not under any Federal statute. The police power of the United States does not extend over this strip of land to which neither the Government nor the Indians have any title, but the right and authority does extend to and is conferred upon the State of Montana.

The case of

United States vs. Four Bottles of Whiskey, 90 Fed. 720,

was one involving the introduction of liquor on an Indian Reservation. Under the laws of the United States relating to the entry of mineral lands, a valid mining claim was located upon the Colville Indian Reservation, and a stock of spirituous liquors was placed upon this mining claim and a saloon established thereon. The court in that case held that:

> "The effect of such a valid location is to segregate the claim from the reservation and extinguish the Indian title thereto, which is merely possessory, so that the land embraced in such location ceases to be Indian country within the meaning of the Revised Statutes, Sections 2139 and 2140, and 29 Statutes, p. 506, Chapter 109, prohibiting the introduction of liquors into the Indian country, and becomes subject to the jurisdiction of the State."

The court, in the case last cited, held that the party introducing liquor upon the mining claim was not guilty of violating the penal statutes of the United States forbidding the introduction of spirituous liquors upon an Indian reservation. Wherein does the principal involved in the case cited differ from the principle involved in the case at bar?

"Congress, having ceded to a railroad company a strip of land running through a portion of the public land set apart for an Indian reservation, the land so ceded was thereby withdrawn from the reservation and became subject to the laws of the territory within the limits of which it was situate."

Utah & N. Ry. Co. vs. Fisher, 116 U. S. 28; 6 Sup. Ct. Rep. 246.

See also;

Maricopa & P. R. Co. vs. Arizona, 156 U. S. 347; 15 Sup. Ct. Rep. 391.
Thomas vs. Gay, 169 U. S. 264; 18 Sup. Ct. Rep. 343.
Truscott vs. Hurlbut Land & Cattle Co., 73 Fed. 60.
King vs. McAndrews, 104 Fed. 434.

As we have seen, the Indians' title or right of occupancy to the right of way of the Northern Pacific Railway Company has been completely extinguished. The Indians have sold it for a valuable consideration. We have further seen that the act of July 2, 1864, granting the right of way to the Northern Pacific Railroad Company, passed to that company the fee or complete title, so that neither the Indians nor the Government of the United States have the slightest right or title to the

right of way under consideration. Upon what, then, we ask, can the jurisdiction of the United States be based to enforce a penal statute against a party while riding upon one of its trains over this right of way? Clairmont was neither in nor on the Flathead Indian Reservation. He was seated in a car on one of the railroad trains of the Northern Pacific Railway Company. He was not getting off, or attempting to get off, or intending to get off, so as to go upon the Indian Reservation. We therefore respectfully insist that he did not introduce any liquor upon the Indian reservation.

Suppose that Henry Clairmont had shot one of the passengers on the train of the Northern Pacific Railway Company at the time and at the place at which he was arrested on the railway train. Would it be contended for a moment that the United States would have jurisdiction to try and punish the defendant for the murder of the person so killed by him? Without question the State of Montana would rightfully have assumed jurisdiction and tried the defendant for the offense committed on the train. We therefore respectfully submit that the United States had no jurisdiction over the defendant at the time and place that he was arrested. At the time and place he had committed no offense and violated no law of the United States. He had not introduced any liquor upon the Flathead Indian Reservation. He could not have introduced any liquor upon the Indian reservation so long as he was riding upon the train of the railway company, which was proceeding along its right of way, to which the railroad had title and of

which the Government had divested itself and eliminated it from the Indian reservation.

We therefore respectfully submit that the United States had no jurisdiction over the defendant for any offense committed on said train. The sole and exclusive jurisdiction of any offense committed on the train was in the State of Montana. The grand jury had no jurisdiction to indict the defendant, nor the District Court to try the defendant. The defendant's motion to be discharged, after the introduction of the Government's case, should have been sustained. The defendant's motion in arrest of judgment challenging the jurisdiction of the court should not have been overruled. For the manifest errors of the court below in assuming jurisdiction of this case, and the punishment of the defendant, this case should be reversed

N. W. McCONNELL,

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